IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-FC-01317-SCT

ROBERT SWINDOL **APPELLANT**

v.

AURORA FLIGHT SCIENCES CORPORATION **APPELLEE**

CERTIFICATION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* MISSISSIPPI ECONOMIC COUNCIL, MISSISSIPPI MUNICIPAL LEAGUE, AND MISSISSIPPI MANUFACTURERS ASSOCIATION SUPPORTING REQUEST FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

1. Robert Swindol, Appellant;

2. David O. Butts, Jr., Counsel for Appellant;

3. Aurora Flight Services Corporation, Appellee;

4. Stephen W. Robinson, Nicholas D. Sanfilippo, and R. Bradley Best, Counsel for Appellee;

5. National Rifle Association, *Amicus Curiae*;

6. Michael B. Wallace and Rebecca L. Hawkins, Counsel for *Amicus Curiae* National Rifle Association;

7. Leaf River Cellulose, L.L.C., *Amicus Curiae*;

8. W. Thomas Siler, Jr., Counsel for *Amicus Curiae* Leaf River Cellulose, L.L.C.;

9. Mississippi Economic Council, *Amicus Curiae*;

10. Mississippi Municipal League, *Amicus Curiae*;

11. Mississippi Manufacturers Association, *Amicus Curiae*;

12. Reuben V. Anderson and G. Todd Butler, Counsel for *Amici Curiae* Mississippi Economic Council, Mississippi Municipal League, and Mississippi Manufacturers Association;

13. Hon. Sharion Aycock, United States District Judge for the Northern District of Mississippi; and

14. United States Court of Appeals for the Fifth Circuit.

By: COUNSEL FOR *AMICI CURIAE*

/s/ Reuben Anderson
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INTEREST OF AMICI CURIAE

This Court should grant rehearing to prevent the likely unintended consequences of its opinion. Without the benefit of full briefing or oral argument, the *En Banc* Court held that an employee may sue his employer under Mississippi common law, even though the employee did not report or refuse to engage in criminally illegal conduct and even though Mississippi Code § 45-9-55 includes no private right of action. This holding conflates common law causes of actions with statutory causes of actions, and, in so doing, opens the door for limitless litigation against Mississippi employers – all in the face of this State's 158-year strict adherence to the at-will employment doctrine. If allowed to stand, this Court's opinion will have the bizarre effect of creating common law causes of action for what were intended to be statutory violations. This Court should, at a minimum, modify the broad language in its opinion so that this case may be reconciled with prior decisions from this Court.

Amici Curiae are the Mississippi Economic Council, the Mississippi Municipal League, and the Mississippi Manufacturers Association. MEC is the voice of Mississippi business, serving over 11,000 members and 1,100 member firms throughout the State. MML is the official non-profit private organization of cities and towns in Mississippi. MMA is the clear and united voice of Mississippi's industry community.

All of the Amici have an interest in this case because it raises questions related to a Mississippi statute[1] affecting public and private employers alike. It is the Amici's concern that this Court's opinion, as currently written, will negatively impact this State's business interests. Mississippi is able to attract and support commerce in part because it does not have the

[1] Specifically, this case involves Mississippi Code § 45-9-55(1), which provides that "a public or private employer may not establish, maintain, or enforce any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage, or other designated parking area."

restrictive employment laws found in other states. If the opinion issued in this case is carried to its logical extension, the longstanding at-will employment doctrine will be a relic of the past. It is for this reason that the Amici respectfully urge this Court to reconsider its decision.

PERTINENT BACKGROUND

This Court's opinion grew out of two federal court diversity actions. The first case, *Swindol v. Aurora Flight Scis. Corp.*, No. 1:13-cv-00237-SA-DAS, 2014 WL 4914089 (N.D. Miss. Sept. 30, 2014), was filed in the Northern District of Mississippi before District Judge Sharion Aycock. The second case, *Parker v. Leaf River Cellulose, L.L.C.*, 73 F. Supp. 3d 687 (S.D. Miss. 2014), was filed in the Southern District of Mississippi before District Judge Keith Starrett. The plaintiffs in both cases argued that § 45-9-55 should be read to include a private right of action or, in the alternative, that a third public policy exception to Mississippi's at-will employment doctrine should be created. *See Swindol*, 2014 WL 4914089, at *4 n.3; *Parker*, 73 F. Supp. 3d at 689-90.

Both Judge Aycock and Judge Starrett granted Rule 12(b)(6) dismissals. Judge Aycock found that no private right of action existed in § 45-9-55 and held that a third exception to the at-will employment doctrine was unwarranted, given that this Court has "steadfastly refused in the more than twenty years since [*McArn*] to expand the exceptions carved out by *McArn* or to recognize any additional public policy exceptions." *See Swindol*, 2014 WL 4914089, at *3-4. Judge Starrett came to the same conclusion and also alternatively held that the immunity provision found in § 45-9-55(5) bars civil claims for money damages. *See Parker*, 73 F. Supp. 3d at 690. Both decisions were appealed to the Fifth Circuit. *See Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516 (5th Cir. 2015); *Parker v. Leaf River Cellulose, L.L.C.*, 621 F. App'x 271 (5th Cir. 2015).

Former Mississippi Court of Appeals Judge Leslie H. Southwick was assigned to the panel of both cases. In the *Parker* case, the Fifth Circuit issued an opinion affirming Judge Starrett's analysis. *See* 621 F. App'x at 273-74. It was specifically explained that "[t]he common law is not a means to end-run legislative enactments." *Id*. at 274. In the *Swindol* case, the Fifth Circuit certified to this Court the question of "whether the well-settled *McArn* doctrine has been affected by Section 45-9-55." *See Swindol*, 805 F.3d at 522.

The certified question was answered on March 24, 2016, without oral argument. *See Swindol v. Aurora Flight Sciences Corp.*, No. 2015-FC-01317-SCT, 2016 WL 1165448, at *8 (Miss. Mar. 24, 2016). Prior to issuing the opinion, letter briefs were accepted from the parties and amicus briefs were accepted from the National Rifle Association and Leaf River Cellulose, LLC. This Court's opinion did not find that § 45-9-55 includes a private right of action but nonetheless held that an employee may seek to remedy a violation of § 45-9-55 through a common law claim for wrongful discharge. *See* 2016 WL 1165448, at *3-8. Aurora Flight Sciences Corporation has moved for rehearing.

ARGUMENT IN SUPPORT OF REHEARING

It of course is not unusual for this Court to alter an opinion after its issuance. Two recent examples are *Willow Bend Estates, LLC v. Humphrey's County Bd. of Supervisors*, 166 So. 3d 494 (Miss. 2013) and *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008), in which this Court either reversed or modified its opinion after amicus briefs were filed offering observations and commentary on implications of the decisions. The Amici respectfully request that this Court take the same approach here, in light of the following two points.

I. The opinion erroneously creates a common law remedy for a statute that itself does not contain a private right of action.

Two avenues exist for a plaintiff to sue his employer upon termination: (1) a common law claim for wrongful discharge or (2) a statutory claim pursuant to a legislatively created private right of action. This Court has conflated these two different avenues, without due consideration of the ill effects that will result from such conflation.

The starting point is that there is no suggestion from this Court's opinion that § 45-9-55 confers a private right of action under which a plaintiff may sue. If there is no private right of action in the statute, an employee may not sue for money damages pursuant to § 45-9-55. *See, e.g., Tunica County v. Gray*, 13 So. 3d 826, 829 (Miss. 2009) ("[A] mere violation of a statute or regulation will not support a claim where no private cause of action exists.").[2]

Given that this Court did not conclude that § 45-9-55 contains a private right of action, only one other possibility for bringing a monetary damages suit remained: that an employer may be sued under Mississippi common law for a violation of § 45-9-55. This is what the opinion holds, but, in so holding, this Court has drastically departed from prior precedent and produced consequences that may not have been anticipated.

The opinion purports to apply *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603 (Miss. 1993). *McArn* began with a description of the at-will employment doctrine, explaining

[2] Both the district courts in *Swindol* and in *Parker* analyzed § 45-9-55 and found no private right of action, focusing specifically on the Mississippi Legislature's failure to express any intent that monetary damages may be pursued through a statutory vehicle. *See* 2014 WL 4914089, at *3-4; 73 F. Supp. 3d at 689-90. In particular, Judge Aycock compared § 45-9-55 to Kentucky's analogous "gun-to-work" statute and concluded that, unlike the Kentucky Legislature, the Mississippi Legislature did not create a private right of action. *See Swindol*, 2014 WL 4914089, at *4 n.3 (explaining that the Kentucky statute expressly states that "[a]ny attempt by a person or organization, public or private, to violate the provisions of this subsection may be the subject of an action for appropriate relief or for damages in a Circuit Court or District Court of competent jurisdiction"). The Fifth Circuit similarly noted that "[n]ot every statutory violation gives rise to a private lawsuit, or to a claim for damages." *See Parker*, 621 F. App'x at 273 n.1. These conclusions are consistent with this Court's well established rule that, absent express statutory language, the party claiming the right of action "must establish a legislative intent, express or implied, to impose liability for violations of that statute." *See Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So. 2d 350, 355 (Miss. 2003) (holding that the Uniform Act for Out-of-State Parolee Supervision did not create a private right of action). The opinion issued in this case did not conduct a private right of action analysis.

that an employer may fire an employee for any reason whatsoever – excepting only those "reasons independently declared legally impermissible." 626 So. 2d at 606. *McArn* then carved out two narrow "public policy" exceptions to the at-will employment doctrine: one for the employee who is fired for reporting criminally illegal conduct and one for the employee who is fired for refusing to engage in criminally illegal conduct. *Id*. at 607. This Court acknowledges in its opinion that the plaintiff in this case was not terminated because he reported or refused to engage in criminally illegal conduct. *See Swindol*, 2016 WL 1165448, at *6. Instead, this Court holds that the plaintiff's termination falls into the category of "reasons independently declared legally impermissible." *Id.*

The flaw in this holding is that, until this case, the phrase "reasons independently declared legally impermissible" has been the way of describing the at-will employment doctrine and not a source of creating common law causes of action. Put differently, the phrase "reasons independently declared legally impermissible" simply has been a reference to statutes which themselves contain private rights of action, such as Title VII, the ADA, the ADEA, and the like. *See, e.g.*, *Berg v. Weyerhaeuser Co.*, No. 1:94-cv-194-S-D, 1995 WL 1945457, at *1 (N.D. Miss. Aug. 10, 1995) (referencing the "reasons independently declared legally impermissible" language and explaining that the at-will employment doctrine is not a defense to an ADA claim). "Independently declared legally impermissible," in short, always has been a separate way to sue an employer through a statute providing a private right of action. It has never been a way to sue an employer through a common law wrongful discharge claim.

Perhaps the best evidence is to consider the origin of the phrase. This Court first used the "reasons independently declared legally impermissible" language in *Shaw v. Burchfield*, 481 So. 2d 247, 253-54 (Miss. 1985), a decision in which then-Justice Robertson noted Mississippi's

strict adherence to the at-will employment doctrine. *Shaw* was decided before *McArn*, which means that, at the time, there were no common law exceptions whatsoever to the at-will employment doctrine. The only way an employer could be sued was through a statute providing a private right of action, i.e. for "reasons independently declared legally impermissible."[3]

There can be no doubt that this Court always has, until now, used the phrase "independently declared legally impermissible" to mean statutes containing private rights of action. No party or court has cited any case in which a plaintiff was allowed to remedy a statutory violation through Mississippi's common law wrongful discharge cause of action.

The reason this always has been the law lies in the notion of separation of powers. As this court acknowledged in *Presley v. Mississippi State Highway Commission*, 608 So. 2d 1288, 1295 (Miss. 1992) (quotation omitted), "courts declare and enforce the law, but they do not make the law."[4] When, as here, a statute does not confer a private right of action, courts should not intervene and create what is not there. This Court expressly took that approach in *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 875 (Miss. 1981), stating that a common law claim would not be found in "the absence of [an] explicit statutory provision of a civil remedy[.]"

Consider the consequences that will flow from this Court's contrary interpretation in this case. If the phrase "reasons independently declared legally impermissible" is no longer simply a reference to statutory law containing a private right of action, plaintiffs may vindicate most, if not all, statutory rights through a common law wrongful discharge claim – and they may do so

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[3] The phrase "reasons independently declared legally impermissible," to be sure, was not part of *McArn*'s holding. *McArn* lifted the phrase from *Shaw* to describe the at-will employment doctrine (i.e., an employer may terminate an employer for any reason, except when there is a statute that allows the employee to sue his or her employer), and then it created two "public policy" exceptions to the at-will employment doctrine it had previously described. *See* 626 So. 2d at 606-07. *McArn* did not utilize the phrase "reasons independently declared legally impermissible" as a basis for creating its two narrow public policy exceptions. *Id*.

[4] *See also Lott v. Saulters*, 133 So. 3d 794, 805 (Miss. 2014), where three members of the current Court joined Justice Dickinson's observation that the Majority's reasoning "places this Court's view of what makes common sense above the Legislature's constitutional authority to make laws."

without even adhering to a statutory scheme. For example, because Title VII independently makes it legally impermissible for an employer to terminate an employee because of the employee's race, employees may now bring a wrongful discharge claim for race discrimination under Mississippi common law, in addition to (or instead of) bringing such a claim under Title VII, which requires administrative exhaustion through the Equal Employment Opportunity Commission. Similarly, because there is an independent prohibition under federal law that forbids age discrimination, employees may now bring a wrongful discharge claim for age discrimination under Mississippi common law without having to go through the EEOC, in addition to (or instead of) bringing such a claim under the ADEA.

The just-referenced examples are only a sample of what is to come.[5] It is not difficult to envision forum shopping by crafty lawyers who seek to pursue traditional federal law claims through this Court's newly created state court vehicle. Plaintiffs now will be able to improperly frustrate a defendant's "statutory right of removal" by artfully pleading what should be a federal claim in state court. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) (explaining that defendants possess a "statutory right of removal" when federal jurisdiction exists). In turn, this will lead to increased caseloads in the state court system, both trial and appellate. And beyond venue preference, defendants will be subject to previously uncontemplated liability exposure. While federal employment statutes cap compensatory damages and often forbid punitive damages altogether, there are no caps for a wrongful discharge claim under Mississippi law, and punitive damages are readily available. *See DeCarlo*

[5] Lest there be any doubt about future implications, Amici point to a plaintiff's brief that was filed in federal court a mere seven days after this Court released its opinion in this case. *See Anderson v. Jackson State Univ.*, Case No. 3:15-cv-00326 (S.D. Miss.), Doc. No. 27 at 17. In *Anderson*, the plaintiff argues that this Court's opinion stands for the proposition that, "under Mississippi law, an employee may not be fired for exercising legal rights." *Id*. Such a characterization of Mississippi law is a far cry from what it was understood to be at any time prior to March 24, 2016.

v. Bonus Stores, Inc., 989 So. 2d 351, 357 (Miss. 2008) (explaining that a claim for wrongful discharge "is an independent tort giving rise to punitive damages").

Beyond federal statutes, it is unclear how the opinion can be reconciled with prior decisions concerning state statutes. Consider, for instance, the Mississippi's Worker's Compensation Act. The Act makes it "legally impermissible" for an employer to prevent an employee injured on the job from filing a worker's compensation claim. Nonetheless, this Court reaffirmed in *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26-27 (Miss. 2003) that a plaintiff who alleged she was terminated for exercising her statutory right to file for workers' compensation benefits could not bring a common law claim for wrongful discharge, since the Worker's Compensation Act did not include a private right of action forbidding retaliation. This Court's reasoning in this case is difficult to square with *Buchanan*.[6]

The consequences of the opinion are especially remarkable when considered alongside this State's historical strict adherence to the at-will employment doctrine. While many other states have comprehensive counterparts to federal employment statutes, Mississippi's legislature has long rejected similar legislation efforts. *See White v. United Parcel Serv.*, 692 F.2d 1, 3 (5th Cir. 1982) (acknowledging that "Mississippi has no state fair employment practices law"). The opinion in this case does judicially what has never been done legislatively.

To clarify, it is not the Amici's argument that this Court is without power to expand the common law. While this Court often has said that "[t]he role of this Court is not to make

[6] The reasoning is equally difficult to harmonize with the long line of cases holding that the two "public policy" exceptions to the at-will employment doctrine may be utilized only if "criminally illegal conduct" is implicated. *See, e.g., Hammons v. Fleetwood Homes of Miss., Inc.*, 907 So. 2d 357, 1048 (Miss. Ct. App. 2005) (interpreting *McArn* as permitting a common law wrongful discharge claim only when "the acts complained of warrant the imposition of criminal penalties"); *see also Howell v. Operations Mgmt. Int'l, Inc.*, 77 Fed. App'x 248, 252 (5th Cir. 2003) (accord); *Zeigler v. U. Miss. Med. Ctr.*, 877 F. Supp. 2d 454, 464 (S.D. Miss. 2012) (accord); *Schuh v. Town of Plantersville, Miss.*, 2014 WL 4199271, *12 (N.D. Miss. 2014) (accord). Section 45-9-55 plainly is not a criminal statute. Consequently, this would be the first case ever to allow a plaintiff to maintain a wrongful discharge claim under Mississippi common law, where there is no criminally illegal conduct at issue.

laws[,]" *see, e.g., Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911, 925 (Miss. 2002) (Carlson, J., Specially Concurring), the Amici acknowledge that this Court judicially created the two narrow public policy exceptions found in *McArn*. The problem here is that this Court expressly disavowed that it was creating a third public policy exception, even though that is how the parties and the Fifth Circuit presented the certified question. *See Swindol*, 2016 WL 1165448, at *6 ("Both the parties and the district court framed the issue as whether this Court should judicially graft another 'exception' to the employment-at-will doctrine. But we need take no such action here[.]").

It is ill-advised, in the Amici's view, for this Court to create a third common law public policy exception, given § 45-9-55's lack of a private right of action. But taking that approach would do far less damage to the previously settled body of employment law in this State. Confusion and uncertainty will result from this Court's unlimited reference to, and new construction of, the phrase "reasons independently declared legally impermissible."[7]

II. The opinion erroneously finds that § 45-9-55(5) has no force in the context of an employee suing his employer.

Again, this Court found that an employee may sue his employer under Mississippi's common law, not that an employee may sue his employer directly under § 45-9-55. Presumably, then, the opinion's discussion of subsection (5)'s immunity provision was meant solely to reject the notion that the Mississippi Legislature would be opposed to this Court providing the remedy

[7] For reasons similar to those articulated in this brief, Justices in other states likewise have been critical of the notion that common law claims may be created from statutes that themselves do not contain a private right of action:

> Considerable peril to the doctrine of separation of powers arises when, as here, a court purports to find the genesis of common law remedies among statutes that actually offer no such remedies. This is breathtaking in its implications. The specter of judicial activism is unloosed and roams free when a court declares, "This is what the Legislature meant to do or should have done."

See, e.g., Roberts v. Dudley, 993 P.2d 901, 912 (Wash. 2000), as amended (Feb. 22, 2000) (Talmadge, J., concurring in result only).

that § 45-9-55 does not. Because it was said that employer immunity "would render Subsection (1) meaningless[,]" this Court rejected both Judge Starrett's and the Fifth's Circuit's interpretation of subsection (5). *See Swindol*, 2016 WL 1165448, at *7.

The opinion rendered in this case makes no effort to address the arguments proving why subsection (5) does not in fact render subsection (1) meaningless. Significantly, subsection (5) bars only "civil actions for damages." It says nothing about private injunctive relief, declaratory relief, enforcement actions by state agencies, or any other potential remedy.

It is not uncommon for a legislature to preclude a particular type of remedy, just as § 45-9-55 precludes "civil actions for damages." Georgia, for example, precludes damage actions but permits enforcement of its "gun to work" law through actions filed by the Attorney General. *See* Ga. Code § 16-11-135(e). There is nothing in § 45-9-55 that would forbid similar enforcement actions in Mississippi or that would even forbid a declaratory or injunctive action for reinstatement filed by a plaintiff. Thus, § 45-9-55 would still in fact have teeth, even without a civil damages remedy.

Notably, the opinion acknowledges "that Subsection (5) contains broad language[.]" *See Swindol*, 2016 WL 1165448, at *7. Subsection (5) specifically provides that "[a] public or private employer shall not be liable in a civil action for damages resulting from or arising out of an occurrence involving the transportation, storage, possession or use of a firearm covered by this section." This Court repeatedly has held that the phrase "arising out of" is synonymous with "causal connection." *See, e.g.*, *Singley v. Smith*, 844 So. 2d 448, 453 (Miss. 2003).

There is certainly a causal relationship between the plaintiff's lawsuit for damages and the plaintiff's transportation and storage of a firearm. As the Fifth Circuit explained in *Parker*, "[t]his is a 'civil action for damages' that, as alleged, results from and arises out of [the

plaintiff's] transportation and storage of a firearm as contemplated by section 45-9-55(1)." *See* 621 F. App'x at 273. The opinion in this case directly conflicts with this Court's prior construction of the phrase "arising out of." *Compare Singley*, 844 So. 2d at 453 (explaining that the phrase "arising out" simply means there is a causal connection between the employment and the injury) *with* this case (overlooking the fact that the plaintiff's civil lawsuit "arose out" of his transportation and storage of a gun).

It is the Amici's position that this Court erred by not interpreting subsection (5) "as written." *See Pat Harrison Waterway Dist. v. County of Lamar*, No. 2013-CA-01535-SCT, 2015 WL 1249679, *10 (Miss. Mar. 19, 2015) (holding that, if the statutory text is plain and unambiguous, then the court must "go no further" and interpret the statute as written). "The legislature may rewrite the law, [but this court should] not." *See Parker*, 621 F. App'x at 274.

CONCLUSION

There are only two logical ways to reach the outcome this Court reached in its opinion: (1) find an implied cause of action in the statute or (2) acknowledge a third public policy exception to the at-will employment doctrine. Understandably, neither approach is desirable because both require this Court to place itself in the role of making, rather than enforcing, the law.

The Fifth Circuit in *Parker* properly characterized the plaintiff's argument as calling on the judiciary to correct an alleged drafting error by the Mississippi Legislature. *See Parker*, 621 F. App'x at 273. It refused that invitation with good reason. If there is a drafting error in the statute, it is the legislature's job to correct it. That commonly occurs after the judiciary construes the language as written, and that is the approach that this Court should have utilized in this case. *See Franklin Collection Serv., Inc. v. Kyle*, 955 So. 2d 284, 288-89 (Miss. 2007) (Dickinson, P.J.) ("[T]his Court has no right, prerogative, or duty to bend a statute to make it say what it does

not say. No citation of authority is necessary for the proposition that courts, judges, and justices sit to apply the law as it is, not make the law as they think it should be.").

Alternatively, even if this Court is willing to cast proper procedure aside for the sake of the particular statute at issue, the opinion should at a minimum be modified to limit the holding to § 45-9-55. At stake is 158 years of settled law. *See Heartsouth, PLLC v. Boyd*, 865 So. 2d 1095, 1108 (Miss. 2003) ("Mississippi has followed the 'employment at will' doctrine since 1858.").

Dated: June 20, 2016.

Respectfully Submitted,

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